NO. 80922-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

JESSE MAGAÑA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY;

Respondents,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

PETITIONER MAGAÑA'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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INTRODUCTION

Petitioner Jesse Magaña files this Answer to the Brief of Amicus Curiae Washington Defense Trial Lawyers ("WDTL").

WDTL argues that Hyundai—which prevented a fair trial when it withheld the OSIs—was denied a fair trial and that this Court should send the case back for a trial to determine whether the OSIs are admissible so that Magana can have the trial he was denied three years ago.

More delay does not compensate Magana for Hyundai's past delay, it does not deter Hyundai from continuing its policy of evading lawful discovery requests, it does not punish Hyundai for its "egregious," "willful," and "false" representations, FF 53, CP 5329, and it does not educate other lawyers and parties to honor their discovery obligations. To the contrary, it punishes Magana with more delay, encourages Hyundai for its egregious tactics and encourages it to continue them, and teaches other lawyers and parties to lie in discovery because the worst that can happen—if they even get caught—is a slap on the wrist and more delay.

The trial court afforded Hyundai due process, a three-day hearing with witnesses and cross-examination, and a full opportunity to defend its conduct. Hyundai's "defense" was a

miserable failure, the trial court finding that its conduct was willful and egregious, that the withheld evidence was both material and relevant, that Magana was severely prejudiced, and that a default was the only sanction that would remedy Hyundai's misconduct. That is all the process Hyundai is due.

ARGUMENT

A. WDTL never disputes the trial court's findings that Hyundai willfully and deliberately lied in its discovery responses.

WDTL begins its brief by disclaiming any effort to defend Hyundai's conduct: "Amicus does not condone the discovery conduct of defendants (at least as characterized by plaintiffs)." WDTL 1. But it is not a question of how Magaña characterizes Hyundai's conduct, but what the trial court found to be the facts.

WDTL concludes its brief by arguing that "[t]he law could be more clear." WDTL 19. As applied to this case, the law is crystal clear.

- You cannot respond to discovery requests falsely, as Hyundai did. FF 12, CP 5316.
- You cannot respond in an evasive and misleading manner, attempting to reframe the issue and unilaterally narrow the discovery sought, as Hyundai did. FF 13, CP 5316.
- You cannot claim that there are only two relevant incidents when there are many more, as Hyundai did. FF 18, CP 5318.

- You cannot receive and investigate claim after claim, photograph the vehicles, collect medical records and police reports, deny the claims, and then fail to supplement responses to discovery requests as Hyundai's lawyers did. FF 12-15, 25, 40-43, 48-49, 52, CP 5316-17, 5320, 5324-25, 5327-28.
- You cannot limit your discovery responses to records currently held in the possession of the corporate legal department, as Hyundai did. FF 21-22, CP 5318-19.
- You cannot limit your discovery responses to cases one lawyer remembers, as Hyundai did. FF 28-29, CP 5321.
- You cannot engage in a pattern of non-compliance with discovery obligations, as Hyundai did. FF 23, CP 5319.
- When you are finally ordered to produce documents, you cannot withhold "highly relevant" documents like ***Acevedo***, as Hyundai did. FF 28-29, CP 5321.
- You cannot claim that a relevant discovery request was taken "off the table," as Hyundai did, when "there was no such agreement." FF 35, CP 5322-23.
- You cannot artificially limit your responses to discovery based on an undisclosed narrow definition of "claims" that is inconsistent with the testimony of your own CR 30(b)(6) designee and your own expert witness, as Hyundai did. FF 37-39, CP 5323-24.

In short, the law is clear that you cannot make "egregious" willfully false representations in response to discovery, as Hyundai did. FF 53, CP 5329.

The appellate majority affirmed these findings. ***Magaña v. Hyundai Motor America***, 141 Wn. App. 495, at 510-14, ¶¶ 30-39, 170 P.3d 1165 (2007), *rev. granted*, 164 Wn.2d 1020 (2008) ("***Magana II***").

B. WDTL never even attempts to defend the actual basis for the appellate court majority's decision.

WDTL totally ignores the basis on which the Court of Appeals majority reversed the judgment in favor of Magaña. The heart of the appellate court majority decision was that delay was not sufficiently prejudicial to Magaña to justify a default judgment. ***Magana II*** at 516-19, ¶¶ 43-48. Because it fails to address the issues in this case, the WDTL brief is singularly unhelpful to this Court's decision.

C. The Court should disregard WDTL's *Hammond/Lawson/ Mitchell* argument because Hyundai never raised it until Hyundai's supplemental brief in this Court.

WDTL's primary argument is that the default judgment is contrary to principles developed in a trio of cases. WDTL 2-9, discussing ***Hammond Packing Co. v. Arkansas***, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909), ***Lawson v. Black Diamond Coal Mining Co.***, 44 Wash. 26, 86 P. 1120 (1906), and ***Mitchell v. Watson***, 58 Wn.2d 206, 361 P. 2d 744 (1961). Although Hyundai invoked the due process clause several times in its appellate pleadings (BA 53, 70, 73, 75, Reply Brief 6, 15, Answer to Petition

17-19), Hyundai first cited these cases and made this argument in its Supplemental Brief.[1]

The ***Hammond/Lawson/Mitchell*** issue is not within the scope of review because it was not raised as an issue in the Petition or Answer: "The Supreme Court will review only the questions raised in . . . the Petition for Review and the Answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition." RAP 13.7(b). The Court consistently refuses to address issues not raised in the Petition or Answer. *E.g.* ***State v. Korum***, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006); ***Denaxas v. Sandstone Court of Bellevue, L.L.C.***, 148 Wn.2d 654, 670-71, 63 P.3d 125 (2003).

Because the issue was not raised in the Petition or Answer, the Court should decline to address it.

D. If the Court chooses to address *Hammond/Lawson/ Mitchell*, the withheld OSIs meet the test of materiality because the trial court clearly found the OSIs "highly material" and "highly relevant."

In finding willfulness, substantial prejudice and the unavailability of a lesser sanction, the trial court entered ample

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[1] Ironically, Magaña cited ***Hammond*** to the trial court, CP 5843, but Hyundai never cited ***Hammond***, ***Lawson*** or ***Mitchell*** to the trial court.

findings that satisfy the ***Hammond/Lawson/Mitchell*** test, should this Court decide to address the issue. These cases require only that the withheld discovery ask for material evidence, and the OSIs are clearly material. The trial court found withheld OSIs "material and significant," "highly material," and "highly relevant." FF 28, 40, 49, 59, CP 5321, 5324, 5327, 5331.

Without admitting it, WDTL is trying to change 100 years of law by arguing that a court cannot default party that has withheld evidence from discovery unless the withheld evidence would be admissible. That has never been the law because it is impossible to prove the admissibility of evidence that has not been produced in discovery. Instead, the test is whether the discovery seeks material evidence, and the court looks to the discovery requests, not to the withheld evidence, to determine materiality. After a three-day evidentiary hearing, Judge Johnson found the withheld OSIs both material and relevant, fully supporting the default.

1. WDTL mischaracterizes *Hammond/Lawson/ Mitchell.*

WDTL's description of ***Hammond/Lawson/Mitchell*** suffers serious flaws. WDTL incorrectly claims that the ***Hovey*** case "noted 'the unsoundness of the contention' that a defendant's answer could be stricken as punishment for contempt of court for

withholding evidence." WDTL 2, quoting ***Hovey v. Elliot***, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). ***Hovey*** has nothing to do with discovery, but concerns a defendant's failure to obey a court order to deposit funds to the registry of the court, which the Court found insufficient to justify a default. 167 U.S. at 411-12.

The Supreme Court applied ***Hovey*** in ***Hammond***, stating that both the law and precedent provided "examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for." 212 U.S. at 351. The Court noted that the Judiciary Act of 1789, "practically coeval with the Constitution," expressly authorized the court to place a defendant in default for the failure to comply with discovery obligations. *Id.* at 352. In contrast to ***Hovey***, in ***Hammond*** the "refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351.

Obviously, the ***Hammond*** court had no way of evaluating whether evidence that was never produced would have been helpful to the plaintiff. But the type of evidence requested by the discovery would have been material to the plaintiff's claims and therefore the Court "must assume [that the withheld evidence] was

material evidence in its possession . . . ." *Id.* at 350. The Court upheld the default in ***Hammond***.

This Court followed a similar analysis in ***Lawson***, which was an action for payment of a real estate commission. The defendant refused to produce evidence relating to the actions of a shareholder, but this Court noted that shareholders have no authority to act for the corporation and that a shareholder's actions do not bind the corporation. 44 Wash. at 35. This Court reversed the order of default because the materiality of the withheld evidence was not clear from the interrogatories and the plaintiff had failed to present facts showing materiality:

> [W]hen a party invokes the harsh remedy of striking a pleading and taking a judgment by default, he must not only allege, but must prove, the facts showing the materiality of the facts of which a discovery is sought, where such materiality does not appear from the interrogatories themselves, and no such showing was made in this case. In other words, he must prove that his adversary has failed or refused to make discovery of material facts.

Id. at 36.

This Court followed the principles of ***Hammond*** and ***Lawson*** in the ***Mitchell*** case, a defamation action brought against Seattle reporter Emmett Watson. Watson refused to name the sources for his story, whereupon the trial court defaulted him. 58 Wn.2d at

209. This Court reversed, holding that the identity of Watson's informant did not establish the elements of plaintiff's case. *Id.* at 217-18. But the Court also held that on remand, the Court could presume that there was no such informant (*Id.* at 218):

> Had defendant Watson identified the alleged source of his information, plaintiffs could have produced him, if available, for the purpose of impeachment. Having refused to identify his alleged informant, the trial court is free to indulge the presumption that defendant Watson admits that there was no such person or that the unidentified person did not make the statement.

This Court noted in ***Mitchell*** that from the days of Washington's first territorial legislature, courts have had the power to default a party for refusing to provide discovery:

> Our first legislature provided that
>
> "If a party refuses to attend and testify at the trial, or to be examined upon a commission, or to answer any interrogatories filed, his complaint, answer, or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: *Provided*, That the preceding sections shall not be construed so as to compel any person to answer any question, where such answer may tend to criminate himself." Laws of 1854, Civil Practice, Chapter XXXIII, § 310, p. 190.
>
> The statute appeared in all codes of the state until 1957 when, having been abrogated and superseded by Rule 37, it was repealed. Laws of 1957, chapter 50, § 1.

Id. at 211 (footnote omitted). CR 37, which now governs this issue, is discussed below.

WDTL badly misstates ***Hammond/Lawson/Mitchell*** when it claims that a default is only appropriate if the withheld evidence would "likely be admissible at trial," WDTL 4, a proposition for which WDTL provides no authority whatsoever. WDTL conflates four different issues: materiality; relevance; admissibility; and whether the withheld evidence would have made a difference to plaintiff at trial.

Materiality cannot be based on the evidence that was withheld by the defendant, because it is impossible to the show that evidence you do not have is actually material. Rather, the materiality must either "appear from the interrogatories themselves," or, if materiality does not appear from the interrogatories, the plaintiff must prove "the facts showing the materiality of the facts of which a discovery is sought . . ." ***Lawson***, 44 Wash. at 36.

Evidence must be material to be relevant, and it must be relevant to be admissible. Material evidence is "[e]vidence having some logical connection with the consequential facts or the issues." ***Black's Law Dictionary*** 578 (7th Ed. 1999, B. Garner Ed.). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." ER 401. ER 401 incorporates both tendency to make facts more likely and materiality. 5 K. Tegland, ***Wash. Prac.: Evidence Law and Practice*** § 401.2 at 258 (5th Ed. 2007). Evidence is admissible if it is relevant and not otherwise inadmissible for some other reason. ER 402. ***Hammond/Lawson/Mitchell*** repeatedly referred to a requirement of "materiality," not relevance, and certainly not admissibility.

The OSIs were material whether or not they were admissible because, as shown *infra*, they could be used for impeachment. And in this expert-intensive case, the experts could rely on the OSIs even if they were not admissible. ER 703.

2. The withheld OSIs are clearly material.

Hyundai withheld OSIs for years, producing them too late to be developed and analyzed by the time of trial. FF 60, CP 5331. Hyundai did not produce the ***Acevedo*** documents until after the trial court struck the trial date and placed Hyundai in default. FF 28, CP 5321. Since the OSIs were produced too late to analyze them by the trial date, under ***Lawson***, the trial court could determine from Magaña's discovery requests whether the requested information was material. Alternatively, the trial court

could examine the OSIs to determine their materiality. Under either test, the OSIs were material. And either way, the appellate court should have deferred to the trial court's exercise of discretion.[2]

The materiality of the withheld evidence is apparent on the face of the requests for production. As the trial court said, "The issue of seatback failure is at the absolute center of this case and the heart of plaintiff's claims." FF 65, CP 5332. Magaña asked in Request For Production 20 ("RFP 20") for production of documents relating to other seatback failures. FF 8, CP 5315. Interrogatory 12 asked about substantially similar Hyundai seatbacks. FF 10, CP 5316. This is obviously material to Magaña's claim because other seatback failures have a "logical connection," ***Black's Dict.***, *supra*, to Magaña's seatback failure and are therefore material.

The trial court found that OSI evidence is relevant, which necessarily includes materiality:

> [I]n general, OSI evidence strengthens the plaintiff's case and undermines the defense's case. It is relevant on issues of notice to Hyundai of a defect, the existence of the defect itself, and causation.

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[2] This is particularly true since Judge Johnson conducted the first trial in 2002, giving her a unique understanding of the accident and the materiality of the OSIs.

FF 55, CP 5330. If Hyundai had simply refused to answer RFP 20 and Int. 12, due process would have permitted a default. The same result should follow where Hyundai willfully lied, then tardily produced the OSIs too late to be used at trial.

Hyundai's own conduct demonstrates the materiality of the OSIs. Hyundai retained attorney Thomas Bullion to defend against the second trial. Bullion argued in another case that the plaintiff had not proven a defect because there were no OSIs. FF 56, CP 5330. In the first trial of this case, Hyundai's attorney Austin made similar arguments. CP 5711-12, CP 5713. Hyundai's own lawyers argue that OSIs are material.

The evidence at the evidentiary hearing also proved "the facts showing the materiality of the facts of which a discovery is sought." 44 Wash. at 36. Magaña's expert witness Baron testified that OSIs are "pretty much the gold standard" in automobile product liability cases. 01/17/06 RP 114. OSIs are relevant to notice, negligent design, defect, and causation. *Id.* at 115-16. Judge Johnson relied specifically on Baron's testimony on these points. FF 55, CP 5329. This evidence and this finding provide additional corroboration of the materiality of the OSIs.

If this were not a sufficient showing of materiality, the trial court examined the OSIs themselves. Magaña's expert engineer Syson stated that the OSIs "would have been invaluable the first time I testified in this case." CP 2665. Syson explained that in the first trial "[i]t would have been useful to show the jury that the sorts of incidents that I was testifying about were known to Hyundai and had occurred in Hyundai vehicles." *Id.* Magaña's forensic pathologist Burton testified that the documents "would have been extremely useful in supporting my opinions had these documents been received prior to the first trial." CP 2669.

Hyundai's expert Thomas McNish testified by deposition that the chances of a front-seatbelted passenger being ejected were so "vanishingly small" as to be "as close to impossible as you can get." CP 3175 (citing CP 3195). Yet the late-produced "Ni" OSI presented precisely that scenario in a suit against Hyundai filed in 1995. Ex 18. *Compare* CP 4551 (photo of accident vehicle in which Magaña was injured)[3] *with* Ex 18 at 50045754D (photo of Ni

[3] The photo of the accident vehicle is attached to Ex 5 to the Habberstad Declaration. CP 4551. Habberstad states that Ex 4 is the accident vehicle and Ex 5 the test vehicle, CP 4520, but the photos are scrambled – Ex 4 is obviously the test vehicle, CP 4544-46, while the last page of Ex 5 is the accident vehicle.

car) (copies attached). Similarly, McNish testified in deposition that it was highly unlikely or impossible for Angela Smith to have broken her femur if she had been in the back seat. CP 3196. Yet the Dowling OSI involved a rear-seat passenger's broken leg from a deformed seatback in a Hyundai Elantra. CP 3175; Ex 35. *See* Ex. 35 at 50043049D (description of Dowling injury) and *id.* at 5004533D (photo of Dowling collapsed seat) (copy attached). These hidden OSIs could have been used to cross-examine McNish during the first trial. CP 3175. Their suppression directly prejudiced Magaña's preparation for the first and second trials. *Id.* The evidence was material.

At least three other OSIs involved back-seat passengers injured by a front-seat collapse. Ex 34 (Urice), Ex 40 (Whittiker), and CP 4724-26 (Acevedo). Similarities between injuries to the backseat passengers in these cases, and to Angela Smith (seated behind Magaña) would have undermined Hyundai's seating-position claims. FF 57-58, CP 5330. *See* CP 4589 (Exhibit to illustrate the Burton testimony) (copy attached). This too was material.

After having heard this testimony, Judge Johnson found the OSI evidence relevant, FF 55, CP 5330, that it relates to occupant

kinematics, and that it is "highly material" and "highly relevant" to seatback failure. FF 49, 55, 58, 59, CP 5327, 5329-31. This proved materiality.

3. WDTL mischaracterizes Magaña's evidence of materiality, mischaracterizes Judge Bridgewater's dissent, and recklessly attacks Judge Johnson.

WDTL claims that Syson and Burton stated that they could not determine whether the OSIs were "relevant to plaintiff's case." WDTL 8. Besides the fact that relevancy is not the test, both experts testified that the OSIs were "invaluable" and "extremely useful." CP 2665, 2669. The fact that it would be difficult or impossible to develop the OSI evidence in time for trial does not mean that the evidence was not relevant, and it certainly does not mean that it was not material.

WDTL also mischaracterizes Judge Bridgewater's dissenting opinion, stating that he "agreed there was no showing of materiality." WDTL 8, citing ***Magaña II***, 141 Wn. App. at 532 ¶¶ 80-81. Judge Bridgewater was referring to whether the OSIs "will probably change the result of the trial . . . ." 141 Wn. App. at 532 ¶ 80. But the test of materiality under ***Hammond/Lawson/Mitchell*** is whether the requested evidence is logically connected to a fact that is of consequence to the determination of the action.

WDTL recklessly insults the trial judge when it claims, without any record citation, "[t]he trial court here conflated misconduct with prejudice." WDTL 7. While any right-thinking person would be offended by Hyundai's conduct, the trial court gave Hyundai a full opportunity to defend itself, holding a three day evidentiary hearing and issuing a carefully reasoned decision. Judge Johnson entered extensive findings on specific prejudice to Magana and the administration of justice. FF 55, 60-64, CP 5329, 5331-32. (See BR 21-23). The Court should categorically reject WDTL's gratuitously pejorative characterization.

E. CR 37(d) clearly authorizes the sanction of default without a prior court order.

WDTL offers an argument never raised by either party when it argues that, "[a] party should never be defaulted (or their suit dismissed) unless they violated a court order." WDTL 9-10. This Court does not generally consider an issue raised only by an amicus. ***Noble Manor v. Pierce County***, 133 Wn.2d 269, 272 n.1 943 P.2d 1378 (1997). Neither party has made this argument

because it is so obviously wrong.[4] In any event, Hyundai violated the trial court's order to produce OSIs by late production and by never producing the ***Acevedo*** claim until after the evidentiary hearing and decision to default Hyundai. FF 28, CP 5321.

CR 37(d) authorizes sanctions for "an evasive and misleading answer" which "is to be treated as a failure to answer." Hyundai's concealment of the OSIs was certainly evasive and misleading. CR 37(d) authorizes the imposition of the sanctions available under CR 37(b)(2)(A), (B), and (C). The last of these subsections, (b)(2)(C), authorizes "rendering a judgment by default against the disobedient party." *See, e.g.,* ***Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.***, 95 Wn.2d 398, 401-402, 622 P.2d 1270 (1981) ("Where the facts fit the criteria of CR 37(d), a party is entitled to CR 37(b)(2)(C) relief."); *see also* 3A K. Tegland, ***Wash. Prac.: Rules Practice*** at 805-06 (5th Ed. 2006).

WDTL's argument was not only never made by the parties and is not only contrary to CR 37 and the case law, it is unworkable and unwise. There was no court order until 2005 because in 2000

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[4] The appellate court majority similarly suggested that a default was not appropriate because Hyundai had not disobeyed a court order. ***Magaña II*** at 517 ¶ 45 n.19. The appellate court ignored rule changes that authorized a default under these circumstances. Supp. BR of Pet. at 10.

Hyundai falsely responded to RFP 20 and Int. 12 and Magaña was unaware of this falsehood. Magaña had no idea that a discovery dispute even existed and no reason to seek a court order. Under WDTL's argument, Hyundai could not have been defaulted although it willfully falsely withheld highly relevant OSIs and prejudiced Magaña's ability to prepare for trial. As a matter of policy, the rule proposed by WDTL would encourage parties to respond falsely to the discovery requests so that their opponents would remain ignorant of the truth. The Court should not even consider WDTL's argument, and if it does so, should unequivocally reject the argument.

CONCLUSION

Nothing in the WDTL brief supports anything other than a reversal of the appellate court majority decision and reinstatement of the default judgment.

RESPECTFULLY SUBMITTED this 9 day of January, 2009.

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CERTIFICATE OF SERVICE

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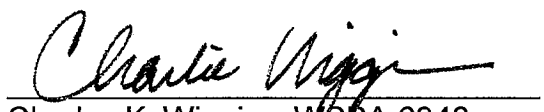

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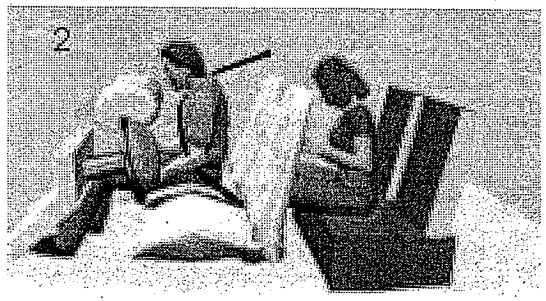
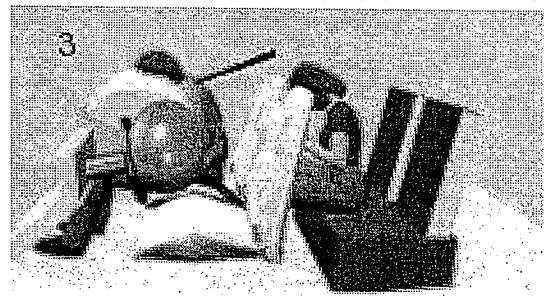
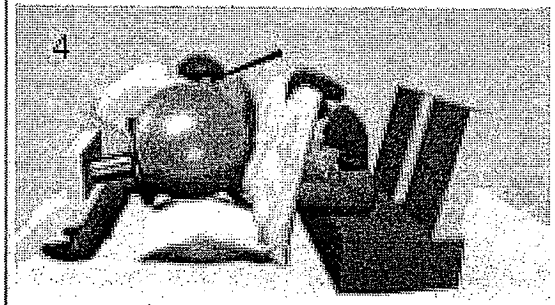
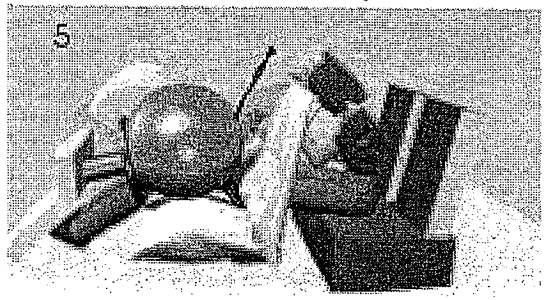
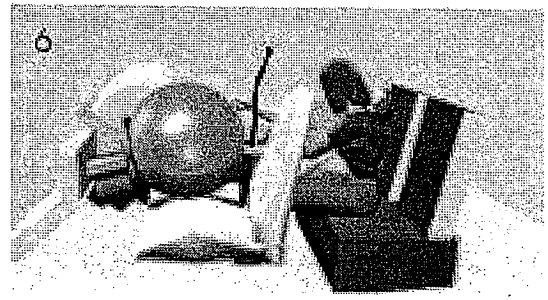
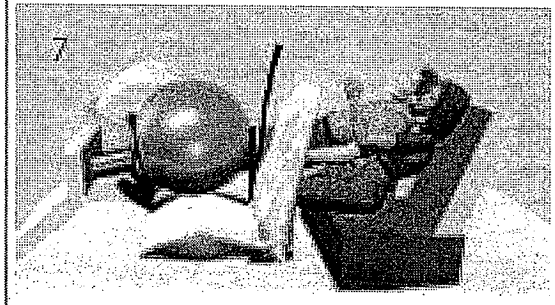


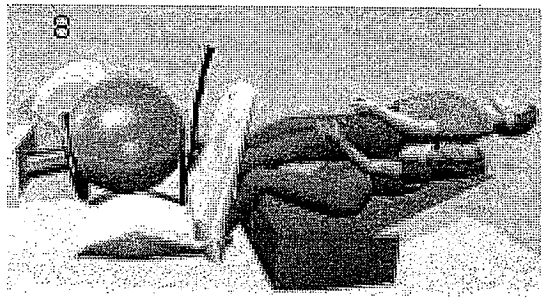


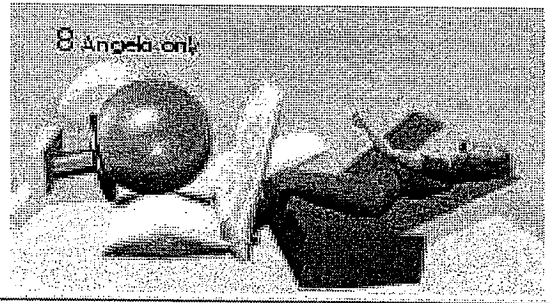










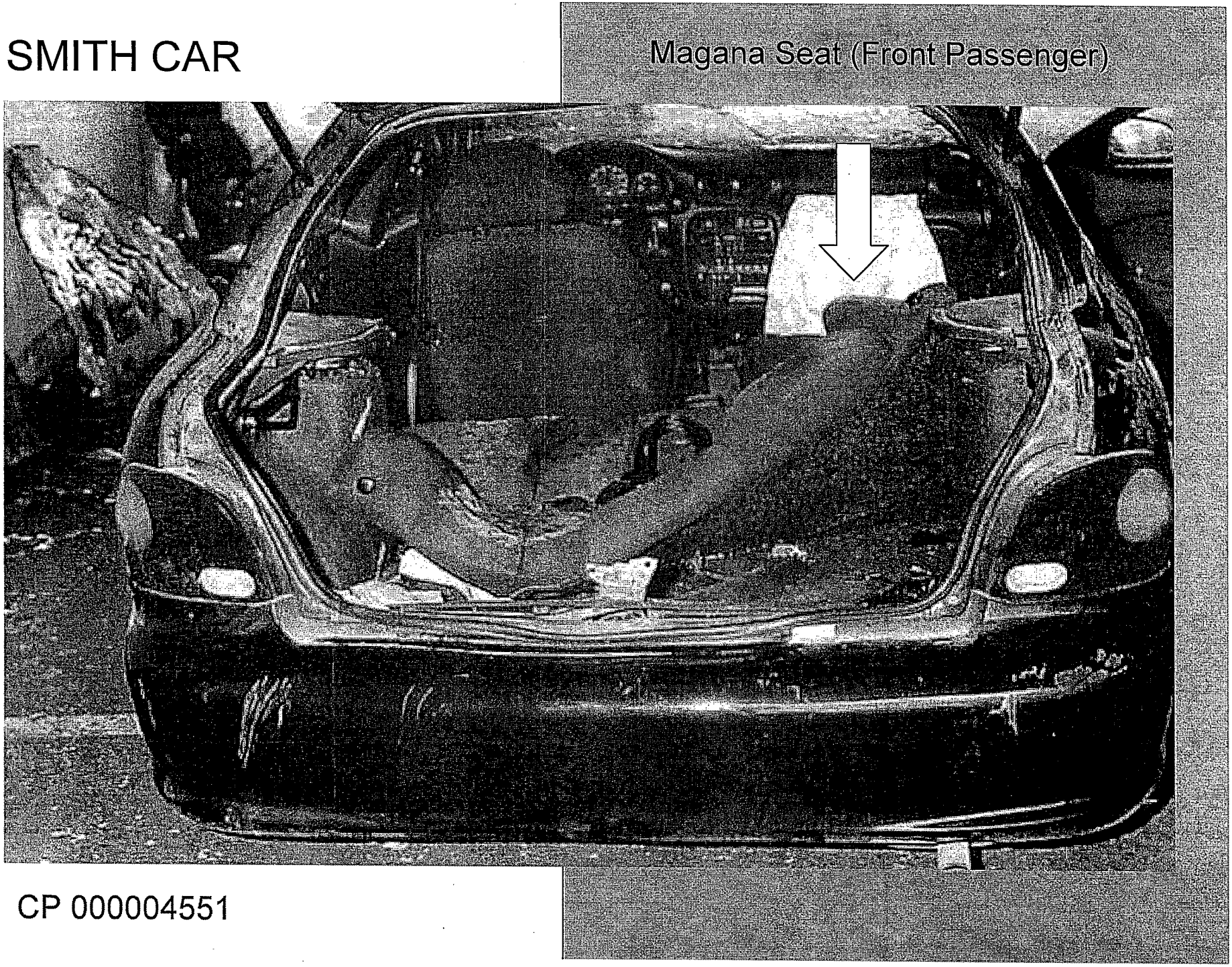


Movement of Jesse Magana
and
Angela Smith During Collisions.

MAGANA vs. HYUNDAI

CP 4589

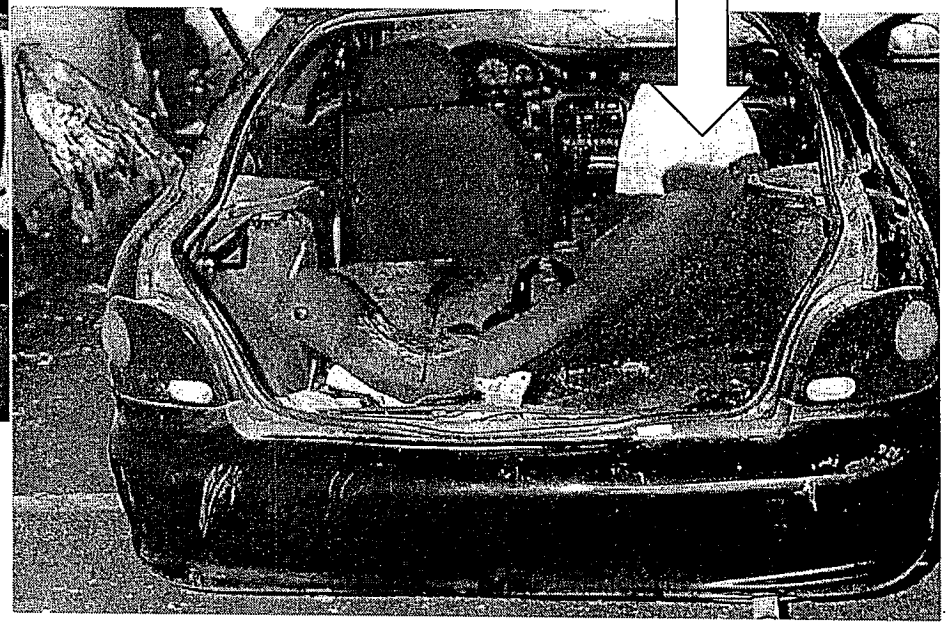
SMITH CAR



CP 000004551

Ni Seat (Driver)

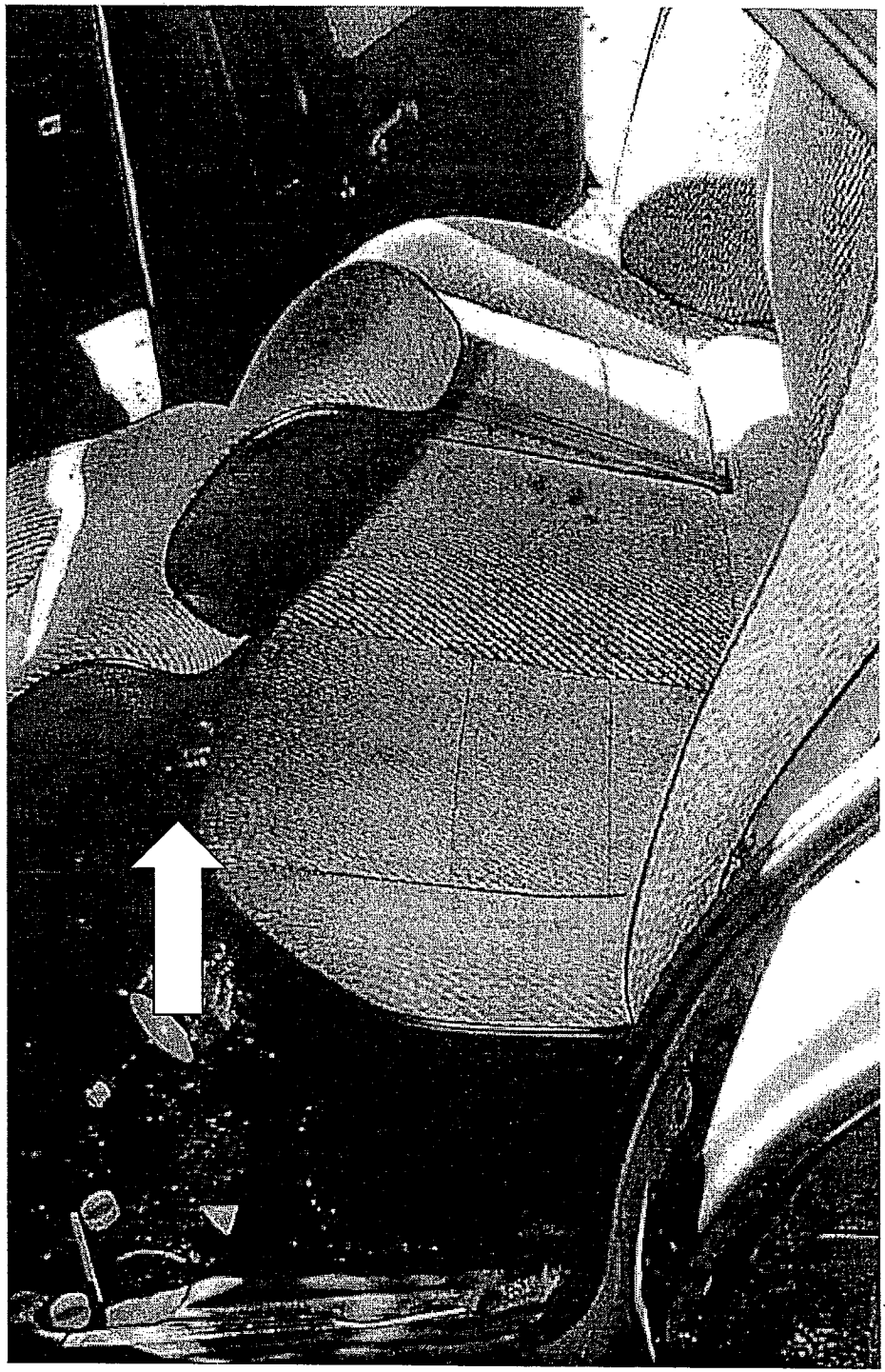
Magana Seat (Passenger)



NI

Exhibit 18 50045754D

CP 000004551



Dowling

Exhibit 35 50045533D